No. 89-156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MOTION FILED
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, *et al.*,
Petitioners,

v.

EDWARD J. and DEBORA A. DAVENPORT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION, CONGRESSMAN HENRY J. HYDE, THE NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, THE NATIONAL VICTIM CENTER, THE STEPHANIE ROPER COMMITTEE, THE CRIME VICTIMS LEGAL CLINIC, PARENTS OF MURDERED CHILDREN, THE UNITY GROUP, AND THE MARYLAND COALITION AGAINST CRIME AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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November 16, 1989

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Pursuant to Rule 36.3 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief. This motion

is made necessary by the refusal of Respondents' counsel to provide consent.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting victims' rights and criminal justice reform. In 1981, WLF published a "Crime Victims Impact Statement" manual to serve as a model guide for implementation at the State level of the use of victim impact information. WLF has appeared as *amicus curiae* in a number of cases dealing with victims' rights issues, including *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989).

Rep. Henry J. Hyde has been a member of the United States House of Representatives since 1975 and has been an active supporter of the rights of crime victims. Congressman Hyde served as a member of the House Judiciary Committee when it was considering legislation that ultimately became the Bankruptcy Reform Act of 1978; Congress' intent when it adopted the Act is the issue presented for review by the Court in this case.

The National Organization for Victim Assistance, headquartered in Washington, D.C., is a nationwide organization of victim and witness assistance programs and practitioners, criminal justice agencies and professional, mental health professionals, researchers, former victims, and survivors, and others committed to the recognition and implementation of victim rights. Its goals include providing a voice for victim interests in various branches of government, ensuring that crime victims across the nation are never more than a phone

call away from help, and helping local victim assistance programs expand their skills and services.

The National Victim Center (formerly The Sunny von Bulow National Victim Advocacy Center) is a national, nonprofit organization based in Fort Worth, Texas. The Center's purposes are to promote responsiveness of the criminal justice system to the rights and needs of the victims of violent crime, as well as to increase public awareness concerning the plight of crime victims through educational programs, conferences, and publications.

The Stephanie Roper Committee, Inc. is a nonprofit organization based in Upper Marlboro, Maryland which was founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Stephanie Roper Committee is a victims' rights advocacy organization which has proposed legislation responsive to the needs of victims.

The Crime Victims Legal Clinic is a project of the California Center of Victimology, a comprehensive crime victim service agency founded in 1985 based in San Diego, California. Among the goals of the clinic is to provide training to the legal and mental health communities who counsel and treat victims of crime; to reduce the trauma suffered by crime victims, their families, and the community in which they live; and to promote and implement the "Victim Bill of Rights."

Parents of Murdered Children, Inc (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national nonprofit, self-help support organization based in Cincinnati, Ohio with chapters nationwide. Besides providing support for grieving parents and family members, POMC provides

information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family.

The Unity Group, Inc. is a Maryland-based advocacy group for battered women and their children that urges criminal prosecution of the abuser where appropriate, provides assistance to victims, and helps make the law enforcement community and judicial system responsive to the special needs of victims of domestic violence.

The Maryland Coalition Against Crime (MCAC) is an organization based in Baltimore, Maryland that works for enactment of legislation that promotes stronger law enforcement efforts and the rights of crime victims. MCAC currently is seeking adoption of a "Victims' Rights Amendment" to the Mayland Constitution.

All of the above-named *amici* wish to present a broader perspective of the issues in this case in order to assist the Court in its disposition. The parties to this case are two criminal offenders who seek to use federal bankruptcy laws to nullify their obligations to make restitution to the victims of their crimes; and the Commonwealth of Pennsylvania, which prosecuted the criminal offenders and opposes their nullification effort. Noticeably absent from this case is representation for individual citizens who are the victims of crime. *Amici* wish to file their brief in order to provide the Court with the views of crime victims. *Amici* believe that the rights of individuals who are the victims of crime will be substantially harmed if the decision of the court below is affirmed.

For the foregoing reasons, *amici curiae* respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*. *Amici* are in a unique position to aid the Court in its consideration of the issues presented. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear. Accordingly, *amici* respectfully request that their motion for leave to file an *amici curiae* brief in support of Petitioners be granted.

Respectfully submitted,

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Date: November 16, 1989

QUESTION PRESENTED FOR REVIEW

Are criminal restitution orders dischargeable "debts" in proceedings under Chapter 13 of the Bankruptcy Code?

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INTEREST OF THE AMICI CURIAE

The interests of the *amici curiae* are set out fully in the Motion for Leave to file accompanying this brief.

STATEMENT OF THE CASE

The relevant facts are simple and undisputed. Respondents Edward and Debora Davenport pled guilty to the crime of welfare fraud in Bucks County, Pennsylvania Common Pleas Court on September 17, 1985. *See Commonwealth of Pennsylvania v. Johnson-Allen [In re Johnson-Allen]*, 871 F.2d 421, 422 (3d Cir. 1989). Each was sentenced to one year probation and ordered to make criminal restitution payments of $208 per month until a total of $2,072.40 had been paid. *Id.* Payments were to be sent to the court's Adult Probation and Parole Department which, in turn, was to forward them to the agency that the Davenports had defrauded, the Pennsylvania Department of Public Welfare (DPW). *Id.*

The Davenports made none of the required payments and instead, on May 25, 1987, filed a bankruptcy petition under Chapter 13 of the Bankruptcy Code. Their debt-adjustment plan, approved by the bankruptcy court on October 20, 1987, provided that DPW and all other "unsecured creditors" would receive no payments on their claims. *Id.*[1]

[1] Chapter 13 of the Bankruptcy Code serves as an alternative to Chapter 7 liquidation for individuals with regular income who wish to pay off at least a portion of their indebtedness over the course of several years. *See, generally*, 5 *Collier on Bankruptcy* Ch. 1322 (15th ed. 1988). Individuals filing for bankruptcy under Chapter 13 must submit a "plan" to the bankruptcy court whereby they agree to pay all anticipated income not necessary for normal living expenses into the court for a specified period of time (generally three years); the plan specifies all of the individual's debts and how much the individual expects to pay on each of those debts. 11 U.S.C. § 1322. The bankruptcy court will confirm the "plan," provided that the plan meets the requirements of 11 U.S.C. § 1325; principal among those requirements is that unsecured creditors must receive at least as much under the plan as they would have received had the debtor's estate been liquidated immediately under Chapter 7. If the debtor makes all payments required under the plan, he is entitled to a complete discharge (with only a very few exceptions) of all debts provided for in the plan. 11 U.S.C. § 1328.

In the meantime, the Probation Department commenced probation violation proceedings against the Davenports based on their failure to make restitution payments. *Id.* The Davenports thereupon in August 1987 commenced an adversary proceeding in the bankruptcy court, seeking a determination that their criminal restitution obligation had been discharged.

Before the bankruptcy court could rule in the adversary proceeding, the state court held a probation violation hearing in October 1987. *Id.* The state court declined to revoke probation, and it extended the Davenport's repayment period to three years. *Davenport v. Commonwealth of Pennsylvania [In Re Davenport]*, 83 Bankr. 309, 311 (Bankr.E.D.Pa. 1988). The state court nonetheless ruled that the restitution order "still stands." *Id.* Under pressure from the state court, the Davenports began making restitution payments in October 1987. *Id.*

Following trial in the adversary proceeding, the bankruptcy court held that the restitution obligation was dischargeable under Chapter 13. *In re Davenport, supra*, 83 Bankr. 309. The bankruptcy court ordered DPW to turn over to the bankruptcy trustee all payments it had received from the Davenports, to be distributed in accordance with the Davenports' Chapter 13 plan. *Id.* at 317. The Davenports thereafter ceased all further restitution payments. The Davenports completed all payments required under their Chapter 13 plan in July 1988 and, accordingly, the bankruptcy court issued an order pursuant to 11 U.S.C. § 1328 discharging all of their debts.

On appeal of the adversary proceeding, the district court reversed, holding that the restitution obligation was not dischargeable under 11 U.S.C. § 1328 because it was not a "debt" as defined by the Bankruptcy Code. *Davenport v. Commonwealth of Pennsylvania*, 89 Bankr. 428 (E.D.Pa. 1988). The United States Court of Appeals for the Third Circuit, in a 2-1 decision issued in March 1989, reversed and directed the

district court to enter an order affirming the bankruptcy court's initial decision. *In re Johnson-Allen*, *supra*, 871 F.2d 421.[2]

The Third Circuit held that a restitution obligation is a "debt" within the meaning of § 101(11) of the Bankruptcy Code, 11 U.S.C. § 101(11), and is not excepted from the general discharge provided by § 1328. The Third Circuit conceded that this Court held in *Kelly v. Robinson*, 479 U.S. 36 (1986), that restitution obligations were not dischargeable in a Chapter 7 bankruptcy. The Third Circuit distinguished *Kelly*, however, by noting that the Court in *Kelly* did not decide whether a criminal restitution obligation was a "debt" within the meaning of § 101(11) but rather held that § 523(a)(7) of the Code (a provision applicable to Chapter 7 cases but not Chapter 13 cases) prevented discharge. *In re Johnson-Allen*, *supra*, 871 F.2d at 426.

INTRODUCTION AND SUMMARY OF ARGUMENT

The rights of victims of crime -- including the right to be compensated by the criminal for harm caused by his crime, the right to play a meaningful role in the system of justice that must deal with the crime, and the right to comfort and understanding of their plight by society as a whole -- have gained increasing acceptance in this country in recent years. However, the decision under review in this case threatens to set back the victims' rights movement significantly. If the Court upholds the Third Circuit's decison in this case, the Court will send a signal to crime victims everywhere that their rights are less important than the alleged rights of criminal

[2] The Davenports' case was consolidated before the Third Circuit with two other cases involving the identical issue -- whether a criminal convicted of welfare fraud and ordered to make restitution payments may obtain a discharge of the restitution obligation by filing a Chapter 13 bankruptcy petition. The Third Circuit held that those other cases were not yet ripe for review. 871 F.2d at 423. Only the Davenports' case is currently before the Court.

offenders to obtain a fresh start in life unencumbered by debts they brought upon themselves through their criminal conduct. It is not conceivable that that was the choice that Congress made when it enacted the Bankruptcy Reform Act of 1978.

The Third Circuit held in this case that criminal offenders may obtain discharges of their criminal restitution obligations in cases filed under Chapter 13 of the Bankruptcy Code. The Third Circuit arrived at its erroneous decision by focusing its attention on a single provision of the Bankruptcy Code rather than, as this Court has instructed, arriving at a decision by considering the entire Code as well the policies that have underlay federal bankruptcy law throughout our nation's history. Had the Third Circuit focused on all the proper factors, it would have discovered that: (1) Congress expressed strongly through Code § 362(b), 11 U.S.C. § 362(b), its desire that criminal offenders not be permitted to use the bankruptcy laws to escape criminal sanctions; (2) pre-1978 law held that criminal restitution obligations could not be discharged by a bankruptcy court, and there is no evidence that Congress intended to change that law or even considered doing so; and (3) the decision it arrived at violated a fundamental federal policy against federal interference with state criminal prosecutions.

Moreover, legislation enacted by Congress following its adoption of the Bankruptcy Reform Act of 1978 has confirmed that Congress never intended, as the Third Circuit believed, to so strongly favor the rights of indigent criminals over the rights of the victims of their crimes. This subsequent legislation, including the Victim and Witness Protection Act of 1982, contains provisions that are inconsistent with a belief that criminal offenders may obtain relief in bankruptcy from their restitution obligations.

ARGUMENT

I. CONGRESS' INTENT NOT TO PERMIT DISCHARGE OF RESTITUTION OBLIGATIONS UNDER CHAPTER 13 IS EVIDENT WHEN THE BANKRUPTCY CODE IS CONSTRUED AS A WHOLE, ALONG WITH ITS OBJECTS AND POLICIES

A. In Determining Congressional Intent, Court Must Be Guided By Examination of Entire Bankruptcy Code.

The Third Circuit arrived at its conclusion that restitution obligations are dischargeable debts under Chapter 13 of the Bankruptcy Code by focusing exclusively on two provisions of the Code: § 101(11), which defines "debt," and § 101(4), which defines "claim." The Third Circuit reasoned that since Congress intended that those two terms were to be broadly interpreted, Congress must have intended a restitution obligation to be a "debt" within the meaning of the Code. *In re Johnson-Allen*, *supra*, 871 F.2d at 424-25.

In so narrowly focusing its search for Congressional intent, the Third Circuit violated a fundamental precept of statutory construction. As the Court explained in *Kelly*, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, *supra*, 479 U.S. at 43 (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986)). Accordingly, the Court in *Kelly* determined Congressional intent with regard to the dischargeability of restitution obligations in Chapter 7 cases by examining the Bankruptcy Code "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems." *Id.* at 43.

The Court should adopt a similar approach in this case. As will be shown below, Congress' intent not to permit bankruptcy proceedings to nullify criminal restitution orders becomes evident if one focuses not solely on the definitional section of the Bankruptcy Code but rather on the entire Code and on the policy factors outlined in *Kelly*.

B. Bankruptcy Code Indicates Congress' Intent to Defer to State Criminal Justice Systems.

A key statutory provision in this case is § 1328 of the Bankruptcy Code, 11 U.S.C. § 1328, which provides that a bankruptcy court "shall" grant to a qualifying Chapter 13 debtor "a discharge of all debts provided for by the plan." In applying § 1328 to this case, one must determinine whether a criminal restitution obligation falls within the category of "debts" subject to the § 1328 discharge. The Third Circuit answered that question by looking to Code § 101(11), which defines "debt" as "liability on a claim." A "claim" in turn is defined very broadly in Code § 101(4) as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

The Third Circuit also cited to legislatve history suggesting that the term "claim" is to be given "the broadest possible definition." *In re Johnson-Allen*, *supra*, 871 F.2d at 424. The Third Circuit concluded that since the terms "debt" and "claim" are so broadly defined, a criminal restitution obligation must be within the class of "debts" discharged in Chapter 13 proceedings by § 1328. *Id.* at 424-25.

1. § 362(b) Demonstrates Congressional Intent.

The Third Circuit's analysis fails to focus on whether Congress intended the discharge provisions of the Code to extend into the criminal sphere. Noticeably absent from the Code's definitions both of "debt" and of "claim," or from the legislative history of those definitional sections, is any indication that Congress intended such an extension. However, Congress' intent with respect to the interplay between the Bankruptcy Code and criminal prosecutions *is* evident in Code § 362, which defines the types of conduct toward a debtor that are automatically stayed by the filing of a bankruptcy petition. Code § 362(b), 11 U.S.C. § 362(b), sets forth 13 types of conduct that are *not* stayed by a bankruptcy filing, including three that are relevant to this case: §§ 362(b)(1), 362(b)(4), and 362(b)(5). Those three provisions provide that a bankruptcy filing is not to stand in the way of state criminal or enforcement actions or of efforts to enforce judgments (other than a money judgment) resulting from enforcement actions.[3] The legislative history of the Bankruptcy Code -- which was enacted in 1978 -- indicates that Congress adopted §§ 362(b)(1), (4),and (5) to make clear that criminals could not use the Code as a shield to protect themselves from punishment for their crimes. *See* H.Rep. No. 595, 95th Cong., 1st Sess. at 342, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6299 ("[t]he bankruptcy laws are not a haven for criminal offenders but are designed to give relief from financial overextensions. Thus, criminal actions and proceedings may proceed in spite of bankruptcy"); S.Rep. No. 989, 95th Cong., 2d Sess. at 51, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5831 (same).

[3] Section 362(b) provides that a bankruptcy filing does not operate as a stay:

> (1) of the commencement or continuation of a criminal action or proceeding against the debtor;
>
> .....
>
> (4) of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
>
> (5) of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a government unit to enforce such government unit's police or regulatory power.

The Third Circuit acknowledged the legislative history cited above but argued that that history was relevant only to automatic stay provisions of the Code, not to discharge provisions. To the contrary, the court argued, the absence of similar language in the legislative history surrounding the definitions of "debt" and "claim" was evidence that Congress intended a "debt," for purposes of the § 1328 discharge, to include restitution obligations. *In re Johnson-Allen*, *supra*, 871 F.2d at 427.

In refusing to consider the language and history of § 362(b) in its analysis of Chapter 13 discharges, the Third Circuit failed to heed this Court's admonition in *K lly* that a court's statutory interpretation be guided by an analysis of the *entire* statute at issue. *Kelly*, *supra*, 479 U.S. at 43. The Third Circuit's holding that criminal restitution orders are dischargeable in Chapter 13 proceedings simply cannot be squared with § 362(b). Under the Third Circuit's interpretation of the Code: (1) the automatic bankruptcy stay does not prevent a State from prosecuting a criminal who has filed for bankruptcy, imposing a sentence that includes a restitution order, or holding a hearing to determine whether the criminal has complied with the restitution order; yet (2) Code § 1328 nonetheless supersedes any state court determination that the criminal must make restitution for his crime. Congress could not have intended the Code to lead to such internally inconsistent results, the much more logical interpretation (which is not inconsistent with any explicit language of the Code) is that while Congress intended the term "debt" to be broadly construed and to permit Chapter 13 debtors to obtain a discharge of virtually all of their debts, Congress never

intended the § 1328 discharge to apply to criminal restitution orders.[4]

Moreover, other circuit courts have uniformly held that a criminal court may as part of its sentence require a defendant to make restitution for a debt that was previously discharged in bankruptcy. *See, e.g., United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984); *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982). Respondents concede that *Alexander* and *Carson* were correctly decided and instead attempt to distinguish those cases from this case. Respondents' Opposition to Petition for Writ of Certiorari at 4-5. However, there simply is no principled basis upon which to distinguish the cases; when, as was true in *Alexander* and *Carson* as well as in this case, a debt arising from a defendant's criminal activity has been discharged in bankruptcy, the dischargeability of a restitution order based on that debt should not depend on whether the restitution order was issued before or after the bankruptcy discharge order. Such a rule would merely reward those criminals who have the foresight to delay filing Chapter 13 petitions and to delay seeking discharge of their debts until

[4] The structure of § 362(b) lends strong support to the argument that Congress did not intend to permit Chapter 13 discharge of restitution obligations. Section 362(b)(4) permits enforcement of a jurisdiction's "police and regulatory power" against a debtor, while § 362(b) (5) permits enforcement of a judgment *except a money judgment* obtained as a result of enforcement of such police and regulatory power. Thus, in the context of police and regulatory power, § 362(b)(5) somewhat limits a State's power to act against a debtor: the automatic stay prevents enforcement of money judgments obtained through use of such powers. *See* 124 Cong. Rec. H11,092 (Sept. 28, 1978) (§ 362(b)(4) is to be given a narrow construction so as not to permit a governmental unit "to protect a pecuniary interest" in the debtor's property). However, in the context of a *criminal* action (which § 362 clearly distinguishes from actions to enforce a governmental unit's police or regulatory power), § 362 contains no similar restriction on the power of a State to enforce its criminal sentences. The obvious implication to be drawn from the absence of such a restriction is that Congress did not intend that the Bankruptcy Code would interfere in any way with criminal sentences, whether in the form of incarceration, fines, or restitution orders.

after their sentencing. Nothing in the Code or its legislative history suggests that Congress intended such an absurd result.

2. § 523(a)(7) Does Not Support Respondents' Case.

The Third Circuit cited Bankruptcy Code § 523(a) (7), 11 U.S.C. § 523(a)(7), in support of its argument that restitution obligations are dischargeable in Chapter 13 cases. Section 523(a)(7) exempts from discharge in Chapter 7 cases any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss...." The Third Circuit noted that this Court in *Kelly* held that restitution obligations fit within the category of debts exempted from Chapter 7 discharge by § 523(a)(7); the Third Circuit reasoned, based on that holding, that restitution obligations must be "debts" within the meaning of the Bankruptcy Code and therefore must be dischargeable under § 1328. *In re Johnson-Allen, supra*, 871 F.2d at 426-27.

The Third Circuit's reasoning is based on a serious misreading of *Kelly*. Nothing in *Kelly* suggests that this Court found that a restitution obligation is to be considered a "debt" for all purposes under the Code. To the contrary, the Court explicitly stated in *dicta* that it had "serious doubts about whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)."[5] *Kelly, supra*, 479 U.S. at 50. In light of that *dictum*, *Kelly* cannot fairly be cited in support of an argument that § 523(a)(7) demonstrates Congress' intent to treat restitution obligations as "debts" for all purposes under the Code.

The § 523(a)(7) argument might be persuasive if there were some indication in either the statute's language or its legislative history that Congress had criminal penalties in mind

[5] The reference should have been to § 101(11).

when it drafted the § 523(a)(7) dischargeability exception. But no such indication exists. Section 523(a)(7) certainly has numerous noncriminal applications; governmental units regularly impose *civil* fines, penalties, and forfeitures that are rendered nondischargeable in a Chapter 7 case (but not a Chapter 13 case) by § 523(a)(7). Indeed, what legislative history exists for § 523(a)(7) suggests that Congress was primarily thinking about tax penalties when it adopted that section. *See Kelly*, *supra*, 479 U.S. at 51 n.13. While, as *Kelly* held, the language of § 523(a)(7) may be broad enough to include criminal penalties, the absence of any evidence that Congress had criminal penalties in mind when it adopted that section undercuts any argument that § 523(a)(7) demonstrates a Congressional intent to make restitution obligations nondischargeable in Chapter 7 but dischargeable in Chapter 13.

3. There Is Nothing Anomalous About a Decision That Would Deprive a Restitution Order Beneficiary of Right to Receive Bankruptcy Distribution.

The Third Circuit, noting that only those owed a "debt" by a debtor in bankruptcy may receive distributions from the bankruptcy estate, argues that a holding that a restitution obligation is not a debt for purposes of a § 1328 discharge "would 'produce the anomalous result that no holder of a right to restitution could participate in the bankruptcy proceeding or receive any distributions of the debtor's assets in liquidation.'" *In re Johnson-Allen*, *supra*, 871 F.2d at 425 (quoting *In re Robinson*, 776 F.2d 30, 35-36 (2d Cir. 1985), *rev'd sub nom Kelly v. Robinson*, 479 U.S. 36 (1986)).

Amici note initially that the Third Circuit's conclusion does not necessary follow from its premise.[6] But even if the Third

[6] The Third Circuit's conclusion is based on an assumption that if Congress intended that a restitution obligation not be considered a "debt" for purposes of the discharge provisions of the Code, it must also have (continued...)

Circuit is correct, *amici* see nothing "anomalous" about a result that would deprive beneficiaries of restitution obligations of a right to participate in a bankruptcy court's distribution of the debtor's assets. For one thing, unsecured creditors receive little or no distribution in a typical Chapter 13 bankruptcy. *See Kohr v. Magisterial District 52-1-01 [In re Kohr]*, 82 Bankr. 706, 712 (Bankr.M.D.Pa. 1988). Thus, being deprived of the right to participate in the distribution is not much of a hardship.[7]

Moreover, there is reason to believe that Congress intended that bankrupt criminals be required to pay criminal penalties from exempt property or future earnings rather than from the bankruptcy estate. For example, Code § 523(a)(7) exempts a government "fine, penalty, or forfeiture" from discharge in a Chapter 7 case (thereby suggesting that such a debt is a high priority debt), yet Code § 726(a)(4) -- which establishes priorities of claims in a Chapter 7 liquidation distribution -- grants such a "fine, penalty, or forfeiture" *lowest* priority, lower even than the priority given to unsecured creditors. One court has explained the disparate treatment afforded government fines, penalties, and forfeitures by §§ 523(a)(7) and 726(a)(4) as follows:

> The governmental unit which has imposed a fine on a debtor is in a far superior position than any unsecured creditor. Its debt is not dischargeable under 11 U.S.C. § 523(7) and the nonpayment of the fine can result in imprisonment. I don't believe Congress was unaware

[6](...continued)
intended that a restitution obligation not be considered a "debt" in connection with any other Code provision. That assumption is not necessarily correct. Although the Court need not decide the issue in this case, it is perfectly plausible that Congress intended a restitution obligation to be considered a debt for purposes of some but not all Code provisions.

[7] For example, DPW received no bankruptcy court distributions in this case despite being listed in the Davenports' Chapter 13 plan as an unsecured creditor.

> of the governmental unit's ability to collect a fine. Rather I think Congress viewed the fine as a form of punishment which should be paid by the debtor from exempt property or future earnings.

In re Kohr, *supra*, 82 Bankr. at 708. In other words, the court determined that Congress had decided not to permit a government that has imposed fines to share in the proceeds of a bankruptcy distribution to the same extent as other creditors, since the fines (unlike the claims of other creditors) would not be discharged in bankruptcy. In light of Congress' determination (in § 726(a)(4)) that governmental fines should receive a priority in a bankruptcy case that is lower than that of other claims -- both because the government can collect after the bankruptcy and because Congress wished such fines to be paid from future earnings -- there is nothing "anomalous" about a rule that deprives beneficiaries of restitution obligations of an opportunity to share in bankruptcy distributions.

In summary, an examination of the entire Bankruptcy Code rather than just its definitional sections demonstrates that Congress did not intend to permit the discharge of restitution obligations in Chapter 13 cases.

C. Bankruptcy Code Must Be Construed in Light of Federalism Concerns.

In construing the Bankruptcy Code, the Court is also to take into account "the interest of the States in unfettered administration of their criminal justice systems." *Kelly*, *supra*, 479 U.S. at 44. Contrary to the teaching of *Kelly*, the Third Circuit failed to take into account that interest in this case. Rather, the court arrived at what it believed to be the correct interpretation of Code § 1328 and only then did it consider what effects its decision would have on State criminal justice systems; the court concluded that "[r]egardless of the potential effects on state criminal proceedings," it had no choice but to follow what it had already determined to be Congress' intent. *In re Johnson-Allen*, *supra*, 871 F.2d at 428. This improper

method of statutory construction caused the Third Circuit to overlook the substantial federalism concerns raised by this case.

The Court explained in *Kelly* why any interpretation of the Bankruptcy Code must take into account the effects that that interpretation will have on state criminal proceedings:

> The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." *Younger v. Harris*, 401 U.S. 37, 46 (1971)....[¶] In one of our cases interpreting the [Bankruptcy] Act [of 1898], Justice Douglas remarked: "[W]e do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). This Court has recognized that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief. *See Younger v. Harris*, *supra*, 401 U.S. at 44-45. This reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case.

Kelly, *supra*, 479 U.S. at 47, 49. The Court also observed that "it is unseemly to require state prosecutors to submit the judgments of their criminal courts to federa bankruptcy courts." *Id.* at 48 n.8.

The federalism concerns that guided the Court in *Kelly* are present to an even greater degree in this case. For example, the lower court decision in *Kelly* threatened bankruptcy court discharges of restitution obligations only; the lower court had recognized that criminal fines could not be discharged in a

Chapter 7 case. By way of contrast, the Third Circuit's opinion -- although applicable on its face to restitution orders only -- does not distinguish between restitution orders and criminal fines and suggests that the latter may also be discharged under Chapter 13.[8]

Moreover, if allowed to stand, the Third Circuit's decision undoubtedly will lead to invalidation of state criminal sanctions in Chapter 7 cases as well as Chapter 13 case. The Third Circuit's conclusion that restitution obligations are to be considered "debts" for all purposes under the Bankruptcy Code will have the effect of undermining *Kelly*'s efforts to prevent interference with state criminal proceedings in Chapter 7 cases. One recent decision that employed the Third Circuit's rationale in a Chapter 7 case to overturn a criminal restitution obligation was *Becker v. County of San Francisco [In re Hackney]*, 83 Bankr. 20 (Bankr. N.D. Cal. 1988). In *Becker* the convicted criminal defaulted on his restitution obligation, and the county sued on that obligation and recovered $2400. The criminal thereafter filed a Chapter 7 bankruptcy petition, and the trustee filed an adversary proceeding against the county for return of the $2400. The bankruptcy court determined that the restitution obligation was a "debt" within the meaning of the Bankruptcy Code. Accordingly, the court held that the transfer of $2400 was a "preference" under Code § 547(b) and ordered the funds to be turned over to the bankruptcy court. *Id.*

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[8] Indeed, an argument can be made that a Pennsylvania restitution obligation fits less well within Code § 101(11)'s definition of a "debt" than does a criminal fine (because a restitution obligation does not create a debtor/creditor relationship between the convicted criminal and the beneficiary of the obligation -- *see Commonwealth v. Mourar*, 349 Pa. Super. 583, 603, 504 A.2d 197, 208 (1986), *vacated and remanded for further proceedings*, 517 Pa. 83, 534 A.2d 1050 (1987)) and thus that restitution obligations might not be dischargeable under Chapter 13 even if criminal fines were found to be dischargeable. However, for purposes of the statutory analysis necessary in this case, *amici* do not believe that it is worthwhile to attempt to distinguish between restitution obligations and criminal fines. *Amici* note that the bankruptcy judge in this case stated in his opinion that the § 1328 discharge provision applies to criminal fines as well as to restitution obligations. *In re Davenport, supra*, 83 Bankr. at 316.

Finally, the Court should take note of the extent of the bankruptcy court's interference in this case with the Pennsylvania criminal justice system. The bankruptcy court attempted to play down the drastic nature of the relief it ordered by claiming that it had not issued an injunction against a probation violation hearing or even determined whether such an injunction was within its powers. *In re Davenport*, *supra*, 83 Bankr. at 316. However, the bankruptcy court's order had the same effect as a formal injunction. The court ordered that any money paid or to be paid by the Davenports to the Probation Department be turned over to the court. *Id.* at 317. That order has the effect of enjoining further collection efforts by the Probation Department, since any additional funds collected will have to be returned immediately to the court. Moreover, were the Probation Department to convene another probation violation hearing, the Davenports could eliminate any violation by paying their restitution obligation in full -- with the knowledge that those funds would have to be returned under the terms of the bankruptcy court's order. Accordingly, there can be no serious argument that the bankruptcy court has not, for all intents and purposes, enjoined further efforts by Petitioners either to collect the restitution obligation or to incarcerate the Davenports for their failure to pay.[9]

In summary, the federalism concerns that guided the Court's statutory interpretation in *Kelly* are implicated in this

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[9] The bankruptcy court that heard one of the companion cases to *Davenport* was even less subtle in its efforts to enjoin a state criminal proceeding without issuing a formal injunction. In *Commonwealth of Pennsylvania v. Johnson-Allen [In re Johnson-Allen]*, 69 Bankr. 461 (Bankr.E.D.Pa. 1987), the bankruptcy judge said that the DPW should return all post-petition restitution payments made by the Chapter 13 debtor and that state prosecutors "should" refrain from further efforts to punish the convicted criminal for nonpayment of her restitution obligation. The court said that it was not issuing an injunction because it expected the DPW and state prosecutors to obey his order without the need for an injunction, but that he would reconsider his decision not to issue an injunction if his order was not obeyed. *Id.* at 471.

case to an even greater extent than was true in *Kelly*. As shown in Section I(B) of this brief, *supra*, an examination of the *entire* Code -- rather than just its definitional section -- demonstrates that Congress did not intend to permit discharge of restitution obligations in Chapter 13 cases. But even if *amici*'s understanding of Congressional intent were merely a plausible rather than the definitive explanation of Congress' intent, *Kelly* teaches that the federalism concerns present here require a finding that Congress did not intend to permit such discharges.

D. There Is No Evidence That Congress Intended to Change the Long-Standing Judicial Rule That Criminal Sanctions Could Not Be Discharged in Bankruptcy.

Prior to enactment of the current Bankruptcy Code in 1978, a well-established judicial rule held that a bankruptcy discharge could have no effect on any portion of a criminal sentence, including a restitution order. *Kelly*, *supra*, 479 U.S. at 47. That rule applied across the board; no distinction was made between liquidation cases and cases brought under the predecessor to Chapter 13.

The Davenports contend that the Bankruptcy Reform Act of 1978 changed that long-standing judicial rule in order to allow Chapter 13 discharges of restitution obligations. However, the Davenports can point to not one piece of evidence in either the Bankruptcy Code or its legislative history to indicate that Congress intended such a major change in the bankruptcy law. *Kelly* teaches that such major changes in bankruptcy law are not to be presumed in the absence of explicit evidence of a Congressional intention to change the law.

In *Kelly*, the Court rejected an argument that Congress in the Bankruptcy Reform Act of 1978 had *sub silentio* altered the long-standing judicial rule against discharge of criminal sentences in bankruptcy in order to permit discharge of

restitution obligations in Chapter 7 cases. The Court said, "If Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, 'we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.'" *Kelly*, *supra*, 479 U.S. at 51 (quoting *TVA v. Hill*, 437 U.S. 153, 209 (1978) (POWELL, J., dissenting)).[10]

Similarly, we can be certain that had Congress intended by the Bankruptcy Reform Act of 1978 to change then-existing bankruptcy law to permit discharge of restitution obligations in Chapter 13 cases, there would have been hearings, testimony, and debate concerning so drastic a change. However, there is nothing in the legislative history even suggesting that Congress intended to permit discharge of restitution obligations in Chapter 13 cases. In the absence of such evidence, the statutory construction rule set forth in *Kelly* and *Midlantic* requires a finding that the Bankruptcy Code does not permit convicted criminals to discharge their restitution obligations in Chapter 13 cases.

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[10] The Court stated its rule of statutory construction as follows:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.* If Congress wishes to grant the trustee an extraordinary exemption from non-bankruptcy law, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.

Kelly, *supra*, 479 U.S. at 47 (emphasis added) (quoting *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986)).

E. There Is No Reason To Distinguish Between Chapter 7 and Chapter 13 in Determining the Dischargeability of Restitution Obligations.

This Court has already determined in *Kelly* that restitution obligations are not dischargeable in Chapter 7 bankruptcy cases. In the absence of any evidence either in the Bankruptcy Code or its legislative history that Congress intended to treat restitution obligations differently in Chapter 13 cases than in Chapter 7 cases, *Kelly* mandates a finding that the Code does not permit the discharge of restitution obligations in Chapter 13 cases.

The Third Circuit's opinion seeks a basis for such a distinction by citing legislative history to the effect that Congress wished to encourage debtors to file under Chapter 13 rather than under Chapter 7. *In re Johnson-Allen*, *supra*, 871 F.2d at 427. The Court reasoned:

> If restitution obligations were not part of the Chapter 13 plan, payments in restitution conceivably could deplete all the debtor's resources before any distribution is made to the other creditors. As a result, creditors would be more reluctant to confirm such a plan, making the Chapter 13 entirely unavailable to some debtors. Such a result is contrary to Congress' objective of expanding the availability of the Chapter 13 option. Therefore, both the language of the statute and the intent of Congress support the conclusion that the criminal restitution obligation is a debt under the Code.

Id. The court's argument proves too much. If Congress' desire to encourage more Chapter 13 filings supports a finding that restitution obligations are dischargeable in Chapter 13 cases, then that desire would justify *any* interference with state criminal proceedings in order to encourage more Chapter 13 filings. The court's argument would just as easily support a claim that a bankruptcy court could enjoin the incarceration of

a convicted criminal, on the ground that freeing the criminal would allow him to earn a living and thus to have a greater chance of successfully completing a Chapter 13 plan. Congress' desire to encourage debtors to file under Chapter 13 rather than under Chapter 7 is not evidence that Congress intended to treat restitution obligations differently in Chapter 13 cases than in Chapter 7 cases.[11]

The bankruptcy court attempted to justify treating restitution obligation differently in Chapter 7 and Chapter 13 by citing Code § 1325(b), 11 U.S.C. § 1325(b). *In re Davenport*, *supra*, 83 Bankr. at 315. Section 1325(b) requires a Chapter 13 debtor to pay in to the bankruptcy trustee all "disposable income" for a period of years in order to fund payments to creditors. The bankruptcy court reasoned that interpreting the Code as forbidding the discharge of restitution obligations would cause "conflicts" for Chapter 13 debtors subject to such obligations. *Id.* The court said that a Chapter 13 debtor could not use a portion of his "disposable income" to pay his restitution obligation without violating § 1325(b); but that if the debtor paid the restitution obligation out of the remainder of his income, by definition he would not have sufficient funds to live on. *Id.* Therefore, the bankruptcy court reasoned, Congress must have intended restitution obligations to be dischargeable in Chapter 13 cases. *Id.*

The bankruptcy court's argument is without merit. The hypothetical debtor described by the bankruptcy court simply sounds like a debtor who is not a good candidate for Chapter 13; not every debtor can qualify. Moreover, the "conflicts" in § 1325(b) do not exist if the statute is interpreted as defining

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[11] Moreover, the legislative history of the Bankruptcy Reform Act of 1978 indicates that Congress intended expanded use of Chapter 13 to benefit creditors as well as debtors: Congress determined that creditors would be better off if more debtors attempted to repay a portion of their debts out of future income rather than opting for straight liquidation under Chapter 7. *See* H.Rep. No. 95-595, 95th Cong., 1st Sess. at 118 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6079. Creditors can hardly be said to benefit from expanded use of Chapter 13 if debtors use it as a vehicle for extinguishing their criminal liabilities.

"disposable income" as the income that remains following payment of one's restitution obligation. Several courts have interpreted § 1325(b) in precisely that manner. *See Commonwealth of Pennsylvania v. Johnson-Allen [In re Johnson-Allen]*, 88 Bankr. 659 (E.D.Pa. 1988); *In re Cancel*, 82 Bankr. 674, 677 (Bankr.N.D.N.Y.), *rev'd*, 85 Bankr. 677 (N.D.N.Y. 1988).

In summary, the policy reasons advanced by the courts below for permitting discharge of restitution obligations in Chapter 13 cases fail to explain why such discharges should be permitted at the same time that discharge of restitution obligations is not permitted in Chapter 7 cases. In the absence of any evidence that Congress intended to make such a distinction between Chapter 7 and Chapter 13, *Kelly* mandates a finding that Congress did not intend to permit discharge of restitution obligations in Chapter 13 cases.

II. SUBSEQUENT CONGRESSIONAL ACTION CONFIRMS ITS UNDERSTANDING THAT RESTITUTION OBLIGATIONS ARE NOT DISCHARGEABLE

On several occasions since its adoption of the Bankruptcy Reform Act of 1978, Congress has adopted legislation that deals directly with restitution obligations. On each such occasion, Congress has expressed its belief that requiring convicted criminals to make restitution to the victims of their crimes is an extremely important goal of the federal criminal justice system. Provisions of the subsequent legislation are inconsistent with any interpretation of the Bankruptcy Code that would permit criminals to discharge their restitution obligations by filing Chapter 13 bankruptcy petitions. Accordingly, Congress' adoption of the subsequent legislation is additional confirmation that Congress never intended to permit such discharges.

A. Victim and Witness Protection Act Demonstrates Congress' Commitment to Imposing Restitution on Criminals.

Congress' adoption of the Victim and Witness Protection Act of 1982 (VWPA), P.L. 97-291, placed the federal government's unqualified endorsement on the concept that convicted criminals ought to be ordered to make restitution to the victims of their crimes. Various provisions of the VWPA render it inconceivable that Congress believed that criminals could discharge their restitution obligations by filing Chapter 13 petitions.

The VWPA requires every federal judge before passing sentence in a criminal case to consider whether, as part of his sentence, to order the convicted criminal to make restitution to the victim(s) of his crime(s). 18 U.S.C. §§ 3663-64. One of the stated purposes of the VWPA is "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." *See* § 9(a) of VWPA, 18 U.S.C. § 1512 note. The legislative history of the VWPA is critical of what Congress viewed as the too infrequent imposition of restitution obligations by federal judges. It makes clear that Congress desired that use of restitution orders be increased. *See* S.Rep. No. 532, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2536.

The VWPA permits imposition of restitution obligations even when the convicted criminal is totally indigent. *United States v. Keith*, 754 F.2d 1388 (9th Cir.), *cert. denied*, 474 U.S. 829 (1985). Courts have recognized that indigency is a temporary condition that a defendant can change and thereby gain the means in the future of meeting the obligation to make restitution imposed at the time of sentencing. *United States v. Atkinson*, 788 F.2d 900 (2d Cir. 1986); *United States v. Ryan*,

874 F.2d 1052 (5th Cir. 1989).[12] Thus, while the VWPA requires a sentencing court to consider the financial condition of a defendant in making a restitution order (18 U.S.C. § 3664(a)(7)), the Act permits courts to look to the defendant's *future* earnings potential in determining his financial capabilities. *Id.*

Respondents have contended that Congress intended through the Bankruptcy Reform Act of 1978 to permit those in financial difficulty to obtain a "fresh start" and that permitting discharge of restitution obligations in Chapter 13 cases is consistent with that "fresh start" concept. However, the VWPA confirms that Congress never intended the "fresh start" concept to apply to convicted criminals or to make the bankruptcy laws a haven for criminals. Rather, Congress made clear through the VWPA that convicted criminals should be required to make reparations to their victims as part of their sentences, *now and in the future*. It was clearly not Congress' intent to provide the courts with the means to require criminal offenders to repay society for the damage caused by their crimes, only to permit the offenders to strip away that power by the simple expedient of filing a Chapter 13 petition.

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[12] The Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits all have ruled that indigency is no bar to imposition of restitution under the VWPA. In addition to *Keith*, *Atkinson*, and *Ryan*, other cases so ruling include *United States v. Sunrhodes*, 831 F.2d 1537 (10th Cir. 1987); *United States v. Purther*, 823 F.2d 965 (6th Cir. 1987); *United States v. Bruchey*, 810 F.2d 456 (4th Cir. 1987); and *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985). In summarizing these court decisions, the Fifth Circuit explained their rationale as follows:

> These circuits have allowed assessments against an insolvent defendant because the Victim and Witness Protection Act does not prohibit restitution in such instances; and a defendant's financial situation may well change in the future, making him able to pay some if not all of the restitution ordered. *Even some payments in the future, no matter how miniscule it might be in relation to the victim's loss, would be in keeping with the philosophy of the Act.*

Ryan, supra, 874 F.2d at 1053 (emphasis supplied).

B. Congress' Adoption of FIRREA Further Demonstrates Its Strong Commitment to Restitution Orders.

In response to the crisis facing federally-insured banks and savings and loan associations, and in an effort aggressively to combat bank fraud, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which became effective August 9, 1989. FIRREA further confirms Congress' strong commitment to imposition of restitution orders on criminal offenders; the restitution provisions of FIRREA, as well as the numerous provisions of the Act increasing bank fraud penalties, are inconsistent with an argument that Congress intended to permit discharge of criminal restitution obligations in Chapter 13 cases.[13]

Anti-bank fraud provisions contained in FIRREA include increases in maximum criminal penalties for bank fraud, a lengthening of the statute of limitations for bank fraud, protection and rewards for whistle blowers who disclose bank fraud, and an authorization to spend $65 million per year for the next three years to investigate and prosecute banking crimes. *See* FIRREA, Chapter IX, Subchapter F. Throughout the anti-fraud provisions of FIRREA is an emphasis on ensuring that those whose conduct led to the current banking crisis be required to disgorge any ill-gotten gains and to make restitution for the damage they caused to others -- including the American taxpayer. For example, § 963(c) of FIRREA amends § 982 of the Criminal Code, 18 U.S.C. § 982, to *require* the sentence of anyone convicted of bank fraud to include forfeiture of any of the defendant's funds derived directly or indirectly from the defendant's fraudulent conduct. Section 902(a)(1) of FIRREA authorizes the Federal Deposit

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[13] Congress' stated purposes in adopting FIRREA were "to strengthen the enforcement powers of Federal regulators of depository institutions," and "to strengthen the civil sanctions *and criminal penalties* for defrauding or otherwise damaging depository institutions and their depositors." Pub.L. No. 101-73, 103 Stat. 183, Title I, §§ 101(9) and (10) (emphasis supplied).

Insurance Corporation to order restitution for losses from any bank official whose conduct "involved a reckless disregard for the law or any applicable regulation."

Congress' commitment to requiring those responsible for the banking crisis to pay for the losses they caused is also evident in FIRREA's legislative history. Numerous members of Congress spoke out during debates on FIRREA regarding the neeed to obtain restitution from those responsible for the crisis. For example, Senator Bond of Missouri stated:

> We cannot, in good conscience, accept the burdens that this bill puts on the taxpayers without actively pusuing every crook who stole from FSLIC *with maximum recovery of ill-gotten gain*. Nor can we proceed without sending a message that there will be tough criminal penalties to be enforced in the future when and if similar fraud is perpetrated.

135 Cong. Rec. S4001 (daily ed. April 17, 1989) (remarks of Sen. Bond) (emphasis supplied).

FIRREA demonstrates Congress' clear intent that those guilty of bank fraud be required to make restitution to society as a whole for the damage they have caused. That intent cannot be squared with an interpretation of the Bankruptcy Code that would permit those found guilty of bank fraud to obtain discharge of criminal sanctions in a Chapter 13 case. Allowing such discharges would eviscerate substantial portions of FIRREA, serve to cut off enforcement efforts aimed at remedying the current financial crisis, and rob American taxpayers of an opportunity to recoup some of the $157 billion which they will be forced to pay.

III. THE THIRD CIRCUIT'S DECISION IS A SETBACK FOR ALL VICTIMS OF CRIME

Both federal and state governments have recognized the importance to our society of requiring that those convicted of

crimes be ordered to compensate their victims for losses caused by their crimes; thus, governments have made restitution a cornerstone of their criminal justice systems. Restitution requirements serve not only to compensate victims but also to punish the offender and to rehabilitate him. *Kelly*, *supra*, 479 U.S. at 52-53. Accordingly, a restitution obligation should not be considered merely another form of debt; a restitution obligation is a debt to society as a whole and a statement by society to crime victims that society cares about their plight. The federal government's strong commitment to restitution orders is evidenced by the VWPA. State governments' commitment is equally strong; restitution orders *must* be considered as a sentencing option in 30 states and is permitted in all 50 states. *See* Comment, *Criminal Restitution as a Limited Opportunity*, 13 New Eng. J. Crim. & Civ. Confinement 243, 244.

The Third Circuit's decision is a significant threat to society's continued ability to require criminals to repay society monetarily for their crimes. Permitting Chapter 13 debtors to discharge their restitution obligations is an open invitation to convicted criminals to file Chapter 13 petitions.[14] Respondents' brief attests to the significant number of instances in which Chapter 13 debtors have obtained bankruptcy court discharges of their restitution obligations, and that list includes only the

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[14] Chapter 13 contains no adequate mechanism to prevent criminals from filing Chapter 13 petitions solely to obtain a discharge of their criminal fines and restitution obligations. Although Code § 1325 requires a Chapter 13 plan to be filed in "good faith," evidence of past dishonesty or that a Chapter 13 filing was made solely for the purpose of obtaining discharge of an otherwise nondischargeable restitution obligation is not considered evidence of bad faith. *In Re Johnson-Allen*, *supra*, 69 Bankr. at 465 n.2.

Nor is it an answer to the plight facing crime victims to tell them that they are entitled to share equally with other unsecured creditors in the proceeds of the criminal's Chapter 13 bankruptcy estate. The priority of crime victims in any Chapter 13 distribution is sufficiently low that they are likely to receive little or no funds in such a distribution. *See In Re Kohr*, *supra*, 82 Bankr. at 712.

reported decisions. *See* Respondents' Opposition to Petition for Writ of Certiorari at 3-4. The Third Circuit case involved three separate instances in which convicted criminals obtained Chapter 13 discharges of their restitution obligations.[15]

The Third Circuit's decision, if allowed to stand, will have a significant negative impact on state and federal criminal justice systems. Faced with the knowledge that they have no method of ensuring that restitution obligations will not later be overturned, criminal justice systems will be forced to turn increasingly to other forms of sentencing to ensure that society's retributive, deterrent, and rehabilitative goals are met to the extent possible. The most likely result will be a lengthening of prison sentences, the one form of sentence that to date no bankruptcy court has attempted to second-guess. But longer prisons sentences may well not be in the best interest of convicted criminals and would exacerabate problems caused by already overcrowded prisons. The flexibility of sentencing judges in choosing the combination of incarceration, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems would be significantly restricted. *See Kelly, supra*, 479 U.S. at 49.

Most significantly, a trend toward longer prison terms in lieu of restitution orders would cause grave harm to the victims of crime. That trend not only would leave victims' losses uncompensated but also would be a signal to victims that society does not care about the harm they have endured. Each of the *amici* has battled long and hard to promote the rights of crime victims and has been heartened by the public's increasing acceptance of victims' rights. Affirmance of the

[15] Not suprisingly, the number of reported cases involving Chapter 13 debtors seeking discharge of restitution obligations has increased dramatically since this Court's decision in *Kelly*. Prior to *Kelly*, most attempts to obtain discharge of restitution obligations involved Chapter 7 debtors.

Third Circuit's decision would be a significant backward step in that struggle.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the Third Circuit's decision and direct the bankruptcy court to enter an order stating that the Davenports' obligation to make restitution for their crimes has not been discharged by their Chapter 13 filing.

Respectfully submitted,

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